In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-484

GARLAND C. COCHRAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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(a)

REFERENCE TO OFFICIAL REPORT

The opinion of the United States Court of Appeals for the Fourth Circuit in this case was rendered on September 1, 1977, and it is in summary form. It is unpublished and unreported. The same is captioned UNITED STATES OF AMERICA, Appellee v. GARLAND C. COCHRAN, Appellant. A copy of the official opinion in this case is appended hereto.

(b)

GROUNDS OF JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit sought to be reviewed here is not published in the official reporter. It is entitled United States of America v. Garland C. Cochran, No. 77-1761, and is dated September 1, 1977. The trial court and the United States Court of Appeals for the Fourth Circuit denied Petitioner's application for bond pending appeal. He is presently incarcerated at the United States Penitentiary, Atlanta, Georgia.

The jurisdiction of this Court is invoked under 28 USC 1254(1), and under and by virtue of 18 USC 3772, within the time provided by Rule 22(2) of the Supreme Court Rules.

Jurisdiction of this Court is invoked because the United States Court of Appeals for the Fourth Circuit has decided important questions of Federal law of gravity and significance in the administration of criminal justice, which have not been and should be settled by this Court. The decision of that court in this case, misapplies the decision of this Court in *Namet* v. *United States,* 373 U.S. 179 (1963), and is contrary to decisions of other Circuit Courts of Appeals, so that the law as applied in the Fourth Circuit now differs from that taught by this Court in *Namet* as construed and applied by other Circuit Courts of Appeals. Additionally, the court below has ruled that it is permissible in Federal courts for the trial judge to appoint the Foreman of the trial jury from among its members in a criminal case, as opposed to leaving that function to the jurors themselves.

(c)

QUESTIONS PRESENTED

1.

WAS REVERSIBLE ERROR COMMITTED BY THE TRIAL JUDGE IN PERMITTING THE GOVERNMENT TO CALL A CONVICTED CO-CONSPIRATOR TO THE WITNESS STAND IN THE PRESENCE OF THE JURY WITH FULL KNOWLEDGE THAT THE WITNESS WOULD REFUSE TO TESTIFY, THEREBY ADDING CRITICAL WEIGHT TO THE GOVERNMENT'S CASE IN A FORM NOT SUBJECT TO CROSS-EXAMINATION?

2.

DO FEDERAL TRIAL COURTS HAVE THE POWER TO APPOINT THE FOREMAN OF A TRIAL JURY FROM AMONG ITS MEMBERS, AS OPPOSED TO INSTRUCTING THE JURY TO ELECT OR SELECT A FOREMAN?

(d)

STATUTES INVOLVED

Petitioner was convicted for the offenses of conspiring to import marihuana, 21 USC 963, in violation of 21 USC 952(a), and the importation of marihuana in violation of 21 USC 952(a). The relevant portions of those statutes are as follows:

Title 21, Section 952(a):

> It shall be unlawful to import into the customs territory of the United States or any place outside thereof (within the United States) or to import into the United

States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter or any narcotic drug in schedule III, IV or V of subchapter I of this chapter.

Title 21, Section 963:

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(e)

STATEMENT OF THE CASE

Petitioner was indicted, tried and convicted in the United States District Court for the District of South Carolina on a two count indictment. The first count of the indictment charged that Petitioner conspired with others to unlawfully import marihuana. The second count of the indictment charged Petitioner and others with the substantive offense of illegal importation of marihuana into the United States from a place outside thereof. There were a total of 11 defendants named in the indictment; 9 of the defendants were tried earlier at a time when Petitioner was considered by the Government to be a fugitive; 6 of the defendants so tried were convicted and 3 were acquitted; one of the defendants named in the indictment has not yet been tried.

Following his conviction, Petitioner appealed to the United States Court of Appeals for the Fourth Circuit, raising the questions here presented, together with other issues. That court affirmed the conviction summarily.

The facts disclosed by the record in this case are somewhat lengthy, but relatively simple. We think it sufficient to state that from the evidence contained in the record, the jury could find that a typical conspiracy existed for the purpose of importing marihuana and that marihuana was, in fact, imported from Colombia, South America, to Chester, South Carolina. The principal question in the trial court was whether or not there was evidence from which the jury could find beyond a reasonable doubt that Petitioner was a member of the conspiracy or that he directly or indirectly aided or abetted in the importation.

The evidence offered on behalf of the Government included a number of witnesses, two of whom were pilot and co-pilot of the airplane involved.

The evidence disclosed that the airplane belonged to Joseph P. Pruitt, a co-indictee, and that Pruitt had played a prominent part in the acquisition of the airplane, the servicing of it and in bringing about the enterprise contemplated by the conspiracy. The pilot, Escobedo, had previously met a man whom he knew as Garland C. Cochran. During the course of the conspiracy, he again met that person and also had a telephone conversation with him. During the course of the trial, he was not asked to, and he did not identify Petitioner as the Garland C. Cochran to whom he had reference. The co-pilot, Tillman, was a Government informer. He testified that he had knowledge of a person known to him under various pseudonyms or nicknames, whom he had never met. During the course of the transactions, he had talked with a person over the telephone who had a very distinctive drawl. Through his participation in the activities, he learned that this person was the person who used the various pseudonyms. On an occasion shortly before the marihuana was imported, Tillman met with others in an

apartment in Atlanta, Georgia, where acts and conversations in furtherance of the conspiracy took place. One of the persons there was a "gentleman with apparently Latin heritage, black curly hair, somewhat pudgy, and with this very distinct southern drawl." This was the person whom he had theretofore known only by such names as "The Old Man," the "Colonel," "Boss," and "Pappy." He was with this person on this occasion for 3 hours or longer. Tillman was asked if he could recognize the person if he saw him again and he answered, "I think so." Asked, "Do you see him in the Courtroom?", Tillman answered, "No, sir, I do not."

DEA Agent Miller testified that a few days after Tillman returned from Atlanta, he displayed to Tillman 6 photographs for identification purposes and Tillman selected two of the photographs, Government Exhibits 2 and 3. Examination of the two photographs discloses that on the reverse side of Exhibit 2 is written the name Garland C. Cochran. Miller testified that he had obtained the photographs from Atlanta; that he had no knowledge as to when the photographs were taken; that insofar as Exhibit 2 being a photograph of Garland C. Cochran, his only knowledge was, "From information received from Atlanta, Georgia, District Office," that "Somebody told (him) that it was" a picture of Garland C. Cochran. Tillman confirmed the fact that he had made an identification of "Pappy" from photographs shortly after the meeting in Atlanta.

As stated, at no time during his testimony was Escobedo asked if he knew Petitioner; if he could identify the man he knew as Cochran; the physical description of that person; whether he would know the man again if he saw him or anything else to identify Petitioner in any way as

a party to the transactions about which he testified. He gave no identifying testimony as to Petitioner nor was he asked if he could identify Petitioner.

During the trial, the United States called Joseph P. Pruitt as a witness. Pruitt, through his counsel, advised the trial court that he would refuse to testify if called as a witness. Out of the presence of the jury, Pruitt and his counsel advised the trial court that he would not testify. This assertion was reaffirmed after the witness was instructed by the court that he could not rely upon his Fifth Amendment privilege. Nevertheless, over objection of Petitioner, Pruitt was called and sworn as a witness before the jury. Having been instructed by the Court that he could not refuse to testify on Fifth Amendment grounds, Pruitt refused to answer questions put to him by the District Attorney, as he had previously stated he would do if called as a witness.

Petitioner objected to the witness Pruitt, whose case the trial court had already advised the jury had been disposed of, being called as a witness in the presence of the jury, he having already made known to the court and to the District Attorney that he would not testify under any circumstances, even though the court instructed him he could not refuse to testify upon Fifth Amendment grounds. The witness did, in fact, refuse to testify.

It is the practice of the trial court in the District of South Carolina to appoint a Foreman from among the members of each trial jury. Prior to trial, Petitioner objected to this practice being followed in his case. The record does not reflect when and in what manner the court did appoint the Foreman of the jury, but it did so, in fact. Petitioner continued his objection.

(f)

REASONS FOR GRANTING THE WRIT

The unpublished, summary opinion of the Fourth Circuit Court of Appeals does not discuss any of the issues raised by Petitioner on his direct appeal to the Fourth Circuit. It stated merely that Petitioner had raised a number of issues, "but upon careful consideration of the record, briefs and oral arguments, we find them to be without merit." In rejecting the arguments and citations urged by Petitioner in his brief to the Fourth Circuit Court of Appeals, that court necessarily considered and overruled Petitioner's contentions presented here. In so doing, it permitted critical evidence against Petitioner to be used by the jury without any guidance or instructions, not subject to cross-examination, to be used to convict Petitioner.

Pruitt's name appeared prominently in the indictment which was before the jury; there was considerable evidence of his participation in the transactions; the jury had been advised that his case had already been disposed of; and at the time he was called as a witness, it was known that he would refuse to testify. This occurred in a situation where Petitioner had not otherwise been identified by any of the witnesses except by what we contend to be the tenuous photographic identification by Tillman. Thus, by innuendo Petitioner was unfairly disadvantaged in a manner which left him at the mercy of the jury to surmise as it would what the testimony of Pruitt would have been had he not refused to testify. The specific questions asked Pruitt in the presence of the jury could have had no other effect but to suggest to the jury that had he testified, he not only could have identified Petitioner as the Garland C. Cochran named in the indictment,

but could have related any "business transactions (he) might have had with Garland C. Cochran" and specifically those transactions alleged in the indictment.

The right to trial by jury in cases involving Federal crimes is guaranteed by the United States Constitution, Article III, section 2. The fact that the jury shall be impartial in such trials is guaranteed by the Fourth Amendment to the Constitution. In South Carolina a trial judge is authorized by statute to appoint the Foreman of a trial jury. Of course, the Federal courts in South Carolina are not bound by this statute; however, in this case, the United States District Court chose to appoint the Foreman of the trial jury. It appears that this is a practice followed by the trial judge and, according to the statement made by him it has been the practice in the District of South Carolina for about 30 years. It is the contention of Petitioner that the appointment of the jury Foreman by the trial judge is an impermissible and prejudicial invasion of the province of the jury. Such practice to the detriment of Petitioner, in effect, places the "13th juror" in the jury box instead of on the bench.

Question 1 Restated

Was reversible error committed by the trial judge in permitting the Government to call a convicted co-conspirator to the witness stand in the presence of the jury with full knowledge that the witness would refuse to testify, thereby adding critical weight to the Government's case in a form not subject to cross-examination?

When the Government announced that it would call Pruitt as a witness, it was made known to the District Attorney and to the court that Pruitt would refuse to testify. The court advised Pruitt that since he had already

been convicted of the offenses contained in the indictment and that the convictions were final, he could not decline to testify on Fifth Amendment grounds and that he could not otherwise decline to testify. The validity of this ruling, although questionable, is not at issue. Pruitt insisted that if the Fifth Amendment was not available to him, he would still refuse to testify. These proceedings took place out of the presence of the jury. At that point, still out of the presence of the jury, Pruitt was called as a witness and sworn. As predicted by him and his counsel, he refused to testify on self-incrimination grounds. He was advised by the court that the Fifth Amendment privilege was not available to him and that if he should persist in refusing to answer questions put to him by the District Attorney, he should not claim that privilege, but merely state that he declined to testify.

Pruitt was named as a defendant in the indictment on trial, which was published in the presence of the jury, and which was submitted to the jury when it began its deliberations. His name had been prominently referred to in the evidence then before the jury and was thereafter referred to prominently in the testimony of the next witness, Escobedo. The jury had been instructed at the outset of the trial that the other defendants charged in the indictment were not on trial, as their "cases have previously been disposed of a considerable time ago."

In this setting, Pruitt was called as a witness and sworn in the presence of the jury. He was then asked to state his full name, which he did, just as his name appears several times in the indictment. He was then asked if he was the same Joseph P. Pruitt that was indicted along with the others in Criminal Docket No. 74-300 and acknowledged that he was. The following questions and responses followed:

Q. All right, sir. Do you know an individual by the name of Garland C. Cochran?

A. I decline to answer.

THE COURT: Are you telling the Court that you refuse to answer the question?

A. Yes, sir.

THE COURT: The Court orders and instructs you to respond and answer the question put to you by the District Attorney.

A. May I speak to my attorney?

. . .

THE COURT: Mr. Pruitt, as I interpret your response to the District Attorney's question, you are in effect stating that you refuse to answer the question put to you by the District Attorney, is that correct?

A. That's correct.

THE COURT: In the light of that interpretation of your reply, and you say that is correct, the Court instructs you that you are to answer the question as put to you by the District Attorney. Will you do so?

A. I decline to answer.

THE COURT: You still decline to answer?

A. Yes, sir.

THE COURT: All right, Mr. District Attorney.

Q. Mr. Pruitt, I ask you again, do you know an individual by the name of Garland C. Cochran?

A. I decline to answer.

Q. All right, sir. If I ask you similar questions relative to any business transactions you might have had with Garland C. Cochran, would your position be the same?

A. Yes.

Q. Would you refuse to answer?

A. Yes.

Q. Even though his Honor has directed you to answer?

A. Yes.

THE COURT: So there can be no misunderstanding, you still tell the Court you refuse to answer this line of questioning?

A. Yes, sir.

THE COURT: Very good, sir.

What possible purpose could this transaction serve, but to prejudice Petitioner in the eyes of the jury? Is there any other explanation as to why Pruitt was required to appear and be sworn as a witness? It was known to the Government and to the Court that he would decline to testify and that his presence before the jury, under the circumstances, would produce no probative evidence. It is totally fair to say that the procedure followed was nothing more than a farce having no other possible projected result than to attempt to convict Petitioner by innuendo. There was no necessity for it and there was no way Petitioner could protect himself from the predictable result.

The witness was not granted statutory immunity; however, it is immaterial whether his refusal to testify was justified under any legal theory. The damage was done.

From the standpoint of Petitioner, crucial, devastating evidence was given in a form not subject to cross-examination; not subject to refutation. In *United States* v. *King,* 461 F.2d 53 (8th Cir. 1972), under circumstances somewhat similar to those present here, witnesses were called and sworn who refused to testify on self-incrimination grounds. In reversing the conviction, the Court observed that no useful purpose was served by calling the witnesses other than to force them to refuse to testify in a manner obviously prejudicial to the defendant. While there the witnesses asserted the Fifth Amendment privilege, rather than merely declining to testify, the resulting prejudice to the defendant, there as here, was the same. There as here, the only apparent purpose the Government had in calling the witness was to create a prejudicial atmosphere. It is no answer to say that the Government had a right to the testimony of Pruitt and that he had no right to withhold it. Even if this be true, the Government knew that Pruitt would refuse to testify.

In *Namet* v. *United States,* 373 U.S. 179 (1963), this Court was concerned with a question similar to that presented here. While the Court did not reverse the conviction under investigation there, it did address itself to the issue and examined the various aspects of it. As we understand the ruling of this Court in that case, it held that each such case must be judged on its own facts, but where "the Government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege" and in the circumstances of a given case, inferences from a witness's refusal to testify add critical weight to the prosecution's case in a form not subject to cross-examination, the defendant is unfairly prejudiced.

While each case must be judged on its own facts, there can be no question but that in the context present here, Pruitt's refusal to answer, despite repeated orders of the Court that he do so, added critical weight to the prosecution's case. *San Fratello* v. *United States*, 340 F.2d 560 (5th Cir. 1965); *United States* v. *Ritz*, 548 F.2d 510 (5th Cir. 1977); *Fletcher* v. *United States*, 332 F.2d 724 (DC Cir. 1964); *United States* v. *Tucker*, 267 F.2d 212; *United States* v. *Maloney*, 262 F.2d 535 (2nd Cir. 1958); and *Melton* v. *United States*, 398 F.2d 321 (10th Cir. 1968).

Question 2 Restated

Do Federal trial courts have the power to appoint the Foreman of a trial jury from among its members, as opposed to instructing the jury to elect or select a Foreman?

It is the practice of the trial court in the District of South Carolina to appoint a Foreman from among the members of each trial jury. Prior to trial, Petitioner objected to this practice being followed in his case. The record does reflect when and in what manner the Court did appoint the Foreman of the jury, but it did so, in fact. Petitioner continued his objection.

The right to trial by jury in cases involving Federal crimes is guaranteed by the Federal Constitution, Article III, section 2. The fact that the jury will be impartial in such trials is guaranteed by the Fourth Amendment. South Carolina has similar provisions within its Constitution: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury . . ." S. C. Const. Art. I, section 18. "The right to a trial by a jury shall be preserved inviolate." S. C. Const. Art. I, section 25. In the early English law, the

judge, in effect, often told the jury what the facts of the case held and how the verdict should be framed. The independence of the jury and the fact that the judge should not inject his influence into the jury verdict, was first established in an early English case involving William Penn and William Mead, who were being tried for preaching to an unlawful assembly in Gracechurch Street. Thomas Vere, Edward Bushell and ten others refused to give a verdict against the defendants in spite of the admonition of the judge that Penn and Mead were clearly guilty. The judge locked the jury up for three days and two nights without meat, drink, fire or tobacco in a fruitless effort to coerce their verdict. Finally, after recording the not guilty verdict, he held the jurors in contempt and put them in jail until their fines were paid. Four of the jurors spent several months in jail. One of them, Edward Bushell, appealed. The High Court of England ordered him released in a landmark decision declaring that the judge could not control the jury's verdict. Rather, the jury was obligated to decide according to its own view of the evidence. *Avakian, "Trial by jury: Is it worth the ordeal?"*, 2 Litigation 8 (1976).

It is the contention of Petitioner that trial by an impartial jury remains one of the most vital protections against governmental arbitrariness, and that, when the judge is allowed to select the jury foreman, he is actually being allowed to inject his influence directly into the jury room. When the jury foreman receives his authority direct from the Court, rather than from his peers on the jury, the independence of the jury is destroyed. To allow a judge the power of appointment of the jury foreman is to deny the separation of the judge and the jury and, in effect, it destroys the impartiality of the jury, constitutional guaranties notwithstanding.

The influence of the jury foreman is strong enough by virtue of his office and duties, but when he has been appointed by the judge, the strongest and most respected person in the court, the other jurors are likely to look upon him with greater respect. The other jurors may feel a link between their foreman and the judge which has the effect of raising the foreman to a position perhaps just below that of an officer of the court. His authority in the jury room is, thus, likely to be enhanced by the fact that one so learned as a judge has seen, in that individual, qualities which are apparently greater than those of the other jurors. This appointment results in greater respect and reliance upon the foreman by the other members of the jury than would be the case if they had selected the foreman themselves.

The appointment of a foreman by the judge may create within the jury room an artificial situation in which one man is esteemed more highly than his intrinsic characteristics, by themselves, would provide. The creation of this situation is an attack upon the independence and impartiality of the jury and a usurpation of part of its authority by the judge. The Court's appointment of a foreman, thus, destroys the separation between the judge and the jury, to the detriment of the defendant on trial.

In order to analyze the means by which prejudice may flow from the judge to the jury, it is necessary to establish that judges themselves may be prejudiced. Courtroom buffs, often including judges on the bench, take immense pride in their ability to spot jurors hostile or sympathetic to one side or the other. *Loaded for Acquittal? Psychology in the Jury Selection Process,* 7 U.W.L.A. L.Rev. 201 (1975). The potential danger inherent in this ability is translated into actual danger when the

judge has the authority to select one of the jurors as the one who will control the proceedings in the jury room.

Every dealing that a judge has with a jury carries with it the possibility of a jury's contamination by the judge's conscious or subconscious prejudices. Every attempt should be made to lessen the possibility, and one solution to the problem is to minimize the judge's dealings with the jury. When the judge selects a jury foreman, he has conscious and subconscious reasons for his particular selection. He may like a particular juror's apparent authority, his address, his social position, or numerous other traits. He may, in particular, like the juror's attitudes toward the case, especially if they appear to coincide with his own. These attitudes may become apparent during the voir dire challenging. The judge may choose as foreman the juror who he believes will be the most likely to influence his fellow jurors to bring a verdict with which the judge would agree. The judge may, in all sincerity, not believe that he is selecting a jury foreman based upon these biases, but the possibility of an unintentional abuse of his power is as present as the possibility of an intentional abuse.

Disregarding the possibility of the judge's bias being reflected in his choice of foreman, and conceding that the judge may even select a foreman whose views turn out to be directly opposed to those of the judge, the fact remains that the jury contains one member who is more powerful than he would otherwise be, for he has derived his authority from the judge himself. The judge's selection of the foreman unnecessarily creates an undesirable influence in the jury room in that the independence of the jury is destroyed to some degree.

When the foreman of a jury is selected by the judge, he has derived his authority from someone of greater power than the jurors themselves, and the jurors may well consider him a super-juror, for he has derived his power not from the jurors themselves, but from the judge. Likewise, this individual, because of his pride in his selection by the judge over all of the others, may find an unyielding loyalty to the Government, of which he considers the judge a part. The judge may have no higher status than any other citizen, but there is no one of higher status in the courtroom. To cloak a foreman with even a fraction of the judge's authority is not only to bring to bear upon the jury the judge's personal biases, if any be apparent, but is also to deny the defendant on trial his right to a trial by a jury of his peers. Clearly, the founders of the Constitution did not intend this injection, and to allow the judge to select the jury foreman creates an inherent imbalance among the judge, jury, Government and defendant.

CONCLUSION

For the reasons set out above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted and this Court should determine that the court below erred in the respects herein urged.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that true copies of the foregoing Petition of Garland Claude Cochran were deposited in the United States Post Office with Air-Mail postage prepaid, addressed to the Solicitor General of the United States, Department of Justice, Washington, D.C.; and to Thomas E. Lydon, Jr., Esquire, United States Attorney for the District of South Carolina, United States Courthouse, Assembly and Laurel Streets, Columbia, South Carolina.

This the 26th day of September, 1977.

ROBERT B. THOMPSON

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 77-1761

UNITED STATES OF AMERICA,
Appellee,
versus
GARLAND C. COCHRAN,
Appellant.

Appeal from the United States District Court for the District of South Carolina, at Rock Hill.
J. Robert Martin, Jr., District Judge.

Argued August 12, 1977

Decided Sept. 1, 1977

Before BUTZNER, Circuit Judge; FIELD, Senior Circuit Judge, and WIDENER, Circuit Judge.

Robert B. Thompson for Appellant; Thomas P. Simpson, Assistant United States Attorney (Thomas E. Lydon, Jr., United States Attorney on brief) for Appellee.

PER CURIAM:

Garland C. Cochran was charged in two counts of a three count indictment with conspiracy to import marihuana and the substantive offense of importing marihuana in violation of 21 U.S.C. Sections 952(a), 960 and 963.

The jury returned verdicts of guilty on each count and Cochran has appealed his convictions.

Upon appeal Cochran has raised a number of issues, but upon careful consideration of the record, briefs and oral arguments, we find them to be without merit. Accordingly, the convictions are affirmed.

AFFIRMED.

No. 77-484

In the Supreme Court of the United States

OCTOBER TERM, 1977

GARLAND C. COCHRAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App.) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1977. The petition for a writ of certiorari was filed on September 27, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the district court erred in allowing the prosecutor to call a previously convicted co-defendant as a witness after the

co-defendant had indicated that he would refuse to answer any questions.

2. Whether petitioner was prejudiced because, in conformity with local practice, the district court appointed the jury foreman.

STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted of conspiracy to import and importation of marihuana, in violation of 21 U.S.C. 952(a), 960 and 963.[1] He was sentenced to eight years' imprisonment, to be followed by two years' special parole. The court of appeals affirmed (Pet. App.).

1. The sufficiency of the evidence adduced at trial is not challenged. It showed that from 1972 to June 1974, petitioner and his co-defendants devised and implemented a scheme to import and distribute substantial amounts of marihuana into the United States from Colombia. As part of the illegal enterprise, the defendants recruited airplane pilots who transported the marihuana in privately owned or leased airplanes (Tr. 72-79, 91-100, 109-112, 117-119). Petitioner, his co-defendants, and the pilots (one of whom was a government informant (Tr. 78)) held several

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[1]In September 1974, petitioner and 10 co-defendants were charged with conspiracy to import, importation of and possession of with intent to distribute 15,000 pounds of marihuana into the United States. On December 9, 1974, the case proceeded to trial against nine of the defendants; petitioner and another co-defendant had not been apprehended by that date, and accordingly their cases were severed. Following the trial, six defendants were found guilty and three were acquitted. The convictions were affirmed. *United States* v. *Velasco*, 539 F. 2d 707 (C.A. 4), certiorari denied, 429 U.S. 977. Petitioner was apprehended on May 18, 1977.

meetings in Colombia, southern Florida, and Georgia, including one meeting at petitioner's residence, at which they discussed remote landing strips to be utilized in transporting the marihuana, the availability of private aircraft, and airplane maintenance problems (Tr. 79-88, 93-114, 290-294).

In June 1974, the pilots went to San Antonio, Texas, where co-defendant Joseph Pruitt gave them his privately owned DC-4 airplane. The pilots then flew the aircraft to Waycross, Georgia, where it developed severe maintenance problems (Tr. 117-122, 298). Due to these difficulties, one of the pilots sought to discontinue the entire operation. After petitioner told the pilot that he had invested $500,000 in the operation, however, the pilot agreed to continue once repairs were made (Tr. 120-121, 298-300). From Waycross, the plane was flown to Rio Hacha, Colombia, where it was loaded with a large quantity of marihuana. Upon its arrival at Chester, South Carolina, the aircraft was seized by Customs and Drug Enforcement Administration agents (Tr. 122-127, 300-303).

2. Joseph Pruitt, one of petitioner's co-defendants, was tried and convicted for his role in the drug operation in December 1974, while petitioner was a fugitive. See note 1, *supra*. During that trial, Pruitt had described his dealings with petitioner in detail, particularly his loan of the DC-4 aircraft that had been used to import the marihuana (Tr. 259-261). In light of this testimony, the government subpoenaed Pruitt to testify about these matters at petitioner's trial.

Prior to Pruitt's being called as a witness, however, his counsel advised the prosecutor that Pruitt would refuse to testify. In an effort to avoid any prejudice to petitioner, the prosecutor promptly brought the matter to the district

court's attention out of the jury's presence (Tr. 249-250). Pruitt's counsel informed the court that, if called, Pruitt intended to invoke his Fifth Amendment privilege against self-incrimination (Tr. 251-252). Following a lengthy hearing, the court determined that Pruitt could no longer claim his privilege against self-incrimination as to matters he previously had voluntarily testified about and that, moreover, since he had already been convicted he could face no further prosecution as a result of his admissions (Tr. 262, 268, 270-271). Despite this ruling, Pruitt maintained that he would nevertheless refuse to answer any questions (Tr. 267-268).

Petitioner's counsel objected to the court's requiring Pruitt to assert a Fifth Amendment claim, however invalid, before the jury (Tr. 269). To alleviate petitioner's concern, the court allowed Pruitt formally to assert his claim of privilege to three questions propounded by the prosecutor outside the jury's presence (Tr. 270-276). Thereafter the jury was returned and Pruitt was asked two of the same questions. Pursuant to instructions given by the court during the hearing (Tr. 270-271, 275-276), Pruitt declined to answer without stating a reason (Tr. 277-281).[2] Pruitt was then dismissed (Tr. 277-281).

ARGUMENT

1. Petitioner contends (Pet. 9-14) that the district court erred in allowing the prosecutor to call co-defendant Pruitt as a witness after Pruitt had indicated his intention to refuse to testify. This contention is insubstantial.

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[2]Despite petitioner's counsel's apparent acquiescence in this procedure (Tr. 269-275), he objected to the questioning during Pruitt's examination (Tr. 278-279).

In *Namet* v. *United States*, 373 U.S. 179, this Court held that "a claim of evidentiary trial error" based upon the government's questioning of a witness with knowledge that he would claim his Fifth Amendment privilege may not be sustained unless the situation was the product of "prosecutorial misconduct" (*id.* at 186) or the "witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination and thus unfairly prejudiced the defendant" (*id.* at 187). Neither requirement is satisfied here.

The prosecutor and the district court could reasonably have believed that Pruitt's conviction, which had been affirmed on appeal, eliminated any Fifth Amendment privilege he may have had to refuse to discuss his conduct in the drug conspiracy. See *Namet* v. *United States*, *supra*, 373 U.S. at 188. There was thus nothing improper in the court's ruling that Pruitt could be compelled to testify concerning his dealings with petitioner with respect to Pruitt's DC-4 aircraft, matters to which Pruitt had voluntarily testified in his previous trial.[3] In light of this ruling, the prosecutor could legitimately have expected and demanded Pruitt's testimony, under the threat of contempt if necessary, and Pruitt's persistence in his refusal to testify therefore cannot be attributed to the government. Accordingly, this is clearly not a case where the prosecution made "a conscious and flagrant attempt to build its case out of inferences arising from use of

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[3]Indeed, Pruitt's voluntary testimony as to these matters on direct examination at his trial also precluded a valid claim of privilege.

testimonial privilege." *Namet* v. *United States, supra*, 373 U.S. at 186. See *United States* v. *Edwards*, 366 F. 2d 853, 870 (C.A. 2), certiorari denied *sub nom. Jakob* v. *United States*, 386 U.S. 908. Indeed, it was government counsel who had alerted the court that Pruitt might attempt to assert a Fifth Amendment claim.

Moreover, Pruitt's refusal to answer two questions asked by the prosecutor in the jury's presence amounted to "no more than minor lapses through a long trial" (*United States* v. *Hiss*, 185 F. 2d 822, 832 (C.A. 2), certiorari denied, 340 U.S. 948) and can hardly be said to have added "critical weight to the government's case" (Pet. 9). See *Namet* v. *United States, supra*, 373 U.S. at 187-189; *United States* v. *Quinn*, 543 F. 2d 640, 650 (C.A. 8); *United States* v. *Brickey*, 426 F. 2d 680, 688 (C.A. 8), certiorari denied, 340 U.S. 948), and can hardly be said to minimized any possible prejudice to petitioner by allowing Pruitt to decline to answer the questions before the jury without using the terms "Fifth Amendment" or "self-incrimination," a procedure (as we have noted) in which petitioner's counsel had seemingly acquiesced. In any event, in light of the overwhelming evidence of petitioner's guilt (the sufficiency of which is not contested), petitioner could not have been prejudiced by this incident.

2. Petitioner contends (Pet. 14-16) that it was improper for the district court to appoint the jury foreman. It has been the longstanding practice in the United States District Court for the District of South Carolina, however, for the trial judge to appoint the foreman of the jury in all civil and criminal cases (Tr. 17-18; Pet. 14). When a juror initially reports for duty in the District he is furnished a booklet entitled "HANDBOOK FOR JURORS serving in the UNITED STATES DISTRICT

COURT." The handbook, which is published by authorization of the Judicial Conference of the United States Courts, contains the following (p. 11):

> In some districts the judge selects the foreman of the jury. In other districts the jurors elect their foreman and in still other districts the first juror to enter the jury box becomes the foreman automatically. The judge will inform you which method is used in your district. The foreman should be a person capable of presiding and should be one who would give every juror a fair opportunity to express his views.

In challenging the practice by which the trial judge selects the jury foreman, petitioner asserts that, as a result of his appointment, the foreman necessarily becomes imbued with more authority in the jury room than he would have if he were chosen by the jurors themselves. Consequently, he argues, the foreman's views and opinions will be given greater weight than those of the other jurors. These contentions are wholly speculative: petitioner fails to allege, and there is nothing in the record to suggest, that he suffered any prejudice because of the court's appointment of the foreman or that the jurors were disposed to defer to the foreman's views. To the contrary, in its final instructions to the jury, the court remarked (Tr. 421):

> That brings us down to the form of the verdict. Mr. Foreman, as I have told you, you will have with you in the jury room, and I address you because I've got to have somebody to turn the proceedings over to in that capacity; however, the fact that he is the acting foreman of that jury doesn't give any priorities or more power to him than any other member of the

> jury. Sometimes it has been suggested that maybe the Court doesn't make a jury understand that everybody has got equal rights sitting on that jury.

There is no reason to presume that the jury ignored this admonition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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